Managing Complex Administrative Hearings

Presented by District Chief Judge Jennifer Gee (ret'd)
August 2023

Course Objective

After this class you will be able to manage your calendar and caseload more efficiently.

Importance of Calendar and Caseload Management

- Better impression to the parties and public
- Improves the judge's productivity
- Enables the judge to work more efficiently
- Easier time meeting statutory and regulatory deadlines
- May be required by judge's performance standards
- Will affect the judge's performance appraisal (if appraisals are given)
- Avoid criticism and pressure from the parties
- Required by Codes of Judicial Conduct

Benefits to the Parties

- Closure for the parties
- Less attorney fees incurred when case is resolved quickly
- Less financial loss for both parties
    - In workers' comp, injured worker's loss of income ends earlier
    - In workers' comp, employer pays less interest on benefits owed

Benefits to the Judge

- Less stress
- Decisions will be easier to write
- Respect of the parties for a prompt decision
- Sense of accomplishment for getting the work done fairly, quickly and efficiently
- Better performance appraisal

Benefits to the Agency

- Good reputation because of the judges' efficiency
- Respect from the public
- Potential for support when there is a budget shortage and the agency has to compete with other less efficient agencies for money

Codes of Judicial Conduct

Codes of judicial conduct require judges to manage their cases.

- Canon 3A(5) – Code of Judicial Conduct for United States Judges
    - A judge should monitor and supervise cases to reduce and eliminate dilatory practices, avoidable delays and unnecessary costs. (effective March 12, 2019)

- Canon 3(A)(5) – Model Code of Judicial Conduct for Administrative Law Judges
    - A state administrative law judge shall dispose of all judicial matters promptly officially and fairly.

- Canon 3(B)(8) – California Code of Judicial Conduct
    - A judge shall dispose of all judicial matters fairly, promptly, and efficiently…
    - Advisory Committee Commentary for Canon 3(B)(8) – A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.

Steps to Managing Our Calendar and Caseload

1. Know your workload
2. Know the requirements for each case assigned to you
3. Control your calendar
4. Control the process and the parties

1. Steps to Knowing Your Workload

- Know how many of your assigned cases:
    - Haven't been reviewed

    - Need to be scheduled for hearing
    - Have been scheduled for hearing
    - Have motions pending
    - Are waiting for post-hearing briefs
    - Are waiting for a decision

- Can any cases be decided without a hearing?
- Can any cases be disposed of earlier on timeliness, jurisdiction, etc. grounds?
- Can any cases be bifurcated? For example, a whistleblower case can be bifurcated into liability and damages phases. The damages phase is not needed if there is no liability found, thus shortening the hearing.

2. Knowing the Case Requirements

- Know the deadlines for each type of case you are assigned
    - Is the case expedited?
    - Is there a deadline for holding the hearing?
    - Is there a deadline for issuing the decision?
    - Is there a deadline for the entire administrative process to be completed? Some Federal whistleblower statutes allow the complainant to go into Federal District Court, but only after the administrative process is completed or a certain number of days has elapsed since the action was first initiated.
- Know what information is required for you to reach a decision.

3. Controlling Your Calendar

To control your calendar, you should factor all the events that affect your schedule, including:

- Hearings
- Expedited cases
- Status conferences
- Prehearing conferences
- Settlement conferences (if you conduct them)
- Motion hearings

You should also allow time to work on motions, prepare orders, write your decisions, and conduct unscheduled status conferences.

Scheduling Hearings

- Get an estimate from the parties at the initial status conference as to how long a hearing may take. If it is a complex multi-day hearing, you may want to add an extra day in case the parties underestimate the time needed. If you have parties who appear before you regularly, you will get to know which parties tend to underestimate. However, if you allocate an extra day, don't tell the parties you actually provided for an extra day because they will fill up whatever time you give them.
- If possible, leave time between hearings to capture your impressions from the hearing you just completed and to review the record and prepare for the next hearing.
- If you travel and hold multiple short (1 day or less) hearings on a trip, you might want consider letting the parties know you may shift their hearing by a day.

  For example, if I have a trip with 3 one-day hearings, I tell the parties scheduled for the first and third day that they are 1 of 3 hearings and that if the hearing scheduled for the second day goes away, their hearing will be shifted so that I can have two hearings in a row. That reduces my travel expense and time away from the office. I tell them that I will give them as much notice as possible.

Status Conferences

NOTE: Some judges refer to all conferences with the parties before the hearing as prehearing conferences. I only refer to the conference with the parties that I conduct just before the hearing as a prehearing conference. I refer to all other conferences as status conferences.

- Suggestions for scheduling status conferences
  - Set aside one day for all status conferences OR
  - Schedule all status conferences for a fixed time each day, e.g. first time in the morning, at the end of the day, or during the lunch hour.

- If anything substantive was discussed during the status conference, issue an order summarizing what was discussed.
- If possible, allow enough time between status conferences to prepare for the next status conference and to draft any necessary order summarizing the status conference that was just held.

- Initial Status Conference (first conference after the case is assigned)

  Conduct an initial status conference with the parties as soon as possible after the case is assigned to you. During the initial status conference, you can:

  - Familiarize the parties, especially a self-represented litigant, with the procedures. If you have a self-represented litigant, explain how the process will work, the burden of proof, what discovery is, etc.
  - Review the issues to be decided with the parties
  - Get estimates from the parties for when the case will be ready for hearing
  - Set a deadline for completing discovery before the hearing
  - Discuss any potential discovery problems
  - Schedule the hearing date and location (if it is not local). If the hearing is not local, confirm with the parties where the hearing should be held.
  - Set the deadline for filing the prehearing statements and exchange of exhibits
  - Schedule the prehearing conference
  - Discuss any special needs for the hearing such as an ADA accommodation, telephone testimony or an interpreter, special equipment
  - Encourage the parties to discuss settlement
  - After the initial status conference, issue an order summarizing the discussions that took place during the status conference

- Subsequent status conferences (if appropriate – not all cases require more than one status conference). Subsequent status conferences prevent attorneys from putting the case on the back burner. Frequent

status conferences, especially in complex cases force the parties to at least contact each other, increasing the likelihood of settlement and better hearing preparation because they will talk to each other before they have to report to the judge at the status conference. How often you hold them will depend on the case as well as the parties.

At any subsequent status conferences ask the parties about:

- the status of the case
- how discovery is progressing
- the status of any settlement discussions
- whether the parties will be ready for hearing by the agreed hearing date

4. Controlling the Process and Parties

- Set firm deadlines for:
  - Filing motions
  - Responses to motions
  - Completion of discovery
  - Filing prehearing motions
  - Filing prehearing statements
  - Closing briefs (if applicable)
- Enforce the deadlines that you set
- Keep track of the deadlines
- Create templates for frequently issued orders, such as orders about continuances, rejecting a filing, motions for change of venue, or notices of hearing so that you do not have to retype the entire order every time you use it and can just go from field to field and fill in case specific information.

Motions

- Require the parties to meet and confer before motions are filed. If the moving party fails to indicate that they met and conferred with the other party before filing a motion, deny the motion without prejudice and tell them to refile it, if necessary, after they meet and confer. This should not be required if there is a self-represented litigant, and

it will not be appropriate for some motions, such as motions for summary judgment/decision.

- Conduct a hearing or status conference, if necessary, to resolve the motion.
- Decide motions as soon as possible

Discovery Motion Deadline

Discovery motion deadlines should be set so that there is enough time for a response to the motion, a motion hearing (if necessary), and for the party to comply with any order before the prehearing statements are due.

Prehearing Motion Deadline

Prehearing motions should be due at least 3 weeks before the scheduled hearing date to allow enough time for the motion to be acted on before the hearing. These may be motions about:

- Witness issues (availability issue, need for telephone testimony, etc.)
- Exhibit disputes
- Requests for continuances
- Request for official notice

Prehearing Statements

- Help the judge to prepare for the prehearing conference and hearing
- Should be filed at least one week before the prehearing conference
- Should include a:
    - statement of the disputed issues
    - statement of the party's position on each disputed issue
    - list of stipulations
    - list of witnesses with a summary of the expected testimony
    - list of exhibits with a description the exhibits
- Exhibits should be exchanged by the parties when the prehearing statements are filed.

- Unless your agency provides otherwise, the proposed exhibits should be provided to the judge at the same time. The advantage to this is that the judge gets to see the proposed exhibits before the hearing. The disadvantage is that a lot of trees are killed if there are lots of exhibits and the case settles before the hearing. This is probably a bad idea if you have a high settlement rate. At the Department of Labor, about 75% of our longshore workers' compensation cases settled before hearing, many of them after the prehearing conference, so the parties were not required to provide the judge's exhibits until the hearing.
- Consider a prehearing statement checkoff or fill in the box form for simple cases. The Department of Labor has one for longshore workers' compensation cases. They can be found at https://www.dol.gov/sites/dolgov/files/oalj/PUBLIC/LONGSHORE/REFERENCES/FORMS/OALJ_PREHEARING_STATEMENT_FY16.PDF.

Prehearing Conference

This is the key to a smooth and efficiently run hearing. At the prehearing conference you will:

- Review the hearing procedures with the parties. This is especially important with a self-represented litigant who needs to understand what will happen at the hearing.
- Confirm the issues to be decided in the case.
- Review the stipulations that have been filed. If none were filed, work with the parties to agree on some stipulations.
- Confirm which witnesses will testify. At this time, limit any duplicative or cumulative witnesses. I tell the party that they will be allowed two witnesses on any particular subject, but let them choose the two witnesses.
- Discuss any special witness scheduling problems.
- Tell the parties to schedule when the witnesses will arrive so that the witnesses do not have to sit around all day waiting to testify.
- Resolve any evidence problems that have arisen.

- Remind the parties to bring 3 copies of the exhibits (one for the themselves, one for the witness and one for the judge) and remind them about how they should be marked.
- Confirm any special accommodations that are needed
    - an interpreter (though this should have been identified earlier so arrangements could be made).
    - ADA needs
    - a speaker phone if there will be telephone testimony
    - a display board for charts (if needed), but make sure any large charts are also reproduced in a size that can be incorporated into the record
    - video equipment
- After the prehearing conference, issue a detailed order confirming the discussions.

<u>Deadlines</u>

- Keep track of all deadlines you set. There are different tools available:
    - Post-it notes on case files that are color coded for deadlines for responses to motions, prehearing motions, prehearing statements, and post-hearing briefs
    - A separate paper calendar with entries on each date for what documents are due
    - Calendar reminders on your electronic calendar
- When setting deadlines, if they are triggered by an event, such as a response to a motion, be specific about what triggers the deadline. Is it the date of mailing or the date of receipt?
- When possible use specific calendar dates to eliminate any excuses or confusion. For example, “The prehearing statement is due September 5, 2020, instead of “The prehearing statement is due 7 days before the hearing.”

Avoiding Continuances

Sometimes, continuances are unavoidable, but they impact how quickly your case is going to be concluded. Here are some suggestions for situations that may arise:

- If a previously approved witness is unavailable explore these options:
    - A continuance if this is a key witness who will require rebuttal testimony
    - Telephone testimony
    - Use a perpetuation deposition instead of live testimony. The deposition can be scheduled at the witness' convenience.
    - Use a discovery deposition, giving the parties an opportunity to decide what parts of the deposition should be included in the record.
    - Schedule a supplemental hearing just to take that witness' testimony, but allow for rebuttal if necessary.
    - Explore stipulated testimony by the parties.

- If a last minute exhibit is offered
    - A continuance may be unavoidable if this exhibit was not available during discovery and further discovery is needed.
    - If the exhibit was not available earlier, but further discovery is not needed, you may just need to allow the other party an opportunity to respond to the exhibit.
    - If the exhibit was available earlier in the proceeding and could have been identified and offered, you can exclude the exhibit.

Managing the Hearing

- Limit the parties to only direct, cross, re-direct, and re-cross examination so that the examination of the witness does not keep going back and forth. Warn the parties during the prehearing conference that you will do this and that they should try to cover everything they want during the direct and cross and to use the re-direct or re-cross for cleanup. Tell them that if you ask questions of the witness after they are finished, you will give them a chance to ask questions but will limit them to the scope of what you asked the witness.

- Make sure before the hearing starts that all the sets of exhibits are identical and properly marked. The parties sometimes fail to bring identical sets of exhibits.
- Make sure all the exhibits to be offered are present at the hearing. The parties will sometimes say some exhibits are not yet available because they're waiting for a deposition transcript or a record that is on its way from a doctor or agency. Even if there is no objection to the absent exhibit being admitted DO NOT ADMIT IT. Tell the parties it will be admitted after it is received. The party may decide the exhibit is not needed leaving you to explain in your decision why an admitted exhibit is not part of the record.
- Use a checkoff list to keep track of the exhibits that were admitted, excluded or withdrawn. Review the list before closing the hearing to make sure all exhibits have been addressed. A sample of the exhibit checkoff list is included in the materials.
- Consider having testimony submitted by deposition.
- Consider having the parties stipulate to any testimony that is not disputed.
- Consider having the direct testimony submitted by declaration or in question and answer form with only live cross-examination.
- If there is an investigative report, consider only have the investigator testify on cross-examination.
- Ask any party offering a voluminous exhibit to identify or offer only the relevant parts. If only part of the exhibit will be offered, the other party should have an opportunity to identify what parts they want admitted.
- Prohibit or stop cumulative witness testimony. If testimony is getting repetitive from a witness, interrupt the testimony, explain that you understand the testimony, summarize your understanding of the testimony and confirm it with the witness.
- Use standing objections for repetitive objections to a certain line of questioning so the proceedings are not repeatedly interrupted with the same objection.
- If you are running out of time for the hearing you can
    - Continue the hearing to another day if possible

- Arrange for post-hearing depositions
- Put a time limit on the parties – this is very risky to do, and I do not suggest it, though I know some judges do use this option.

Post-hearing Considerations

- Will you get a hearing transcript? If there is a transcript, I suggest asking for a condensed transcript. It kills less trees because four pages of text are put on one page, but the biggest benefit is that there is a word index at the end that lets you find a spot in the transcript more easily if you can come up with a word you can look for.
- Do you want oral or written closing statements?
- If you have written closing statements, do you want them filed simultaneously or sequentially. Do you want reply briefs? If you have closing briefs, put a page limit on them to avoid a 160 page closing brief. If you have written closing briefs, in a post-hearing order, spell out to the parties any specific issues that you want them to address. For instance, in workers' compensation cases, a common disputed issue is the average weekly wage at the time of the injury. If it is an issue, I tell the parties I want them to tell me how calculated the average weekly wage, what data they used, and where the data can be found in the exhibits.
- Review your exhibit check-off form to make sure all exhibits have been addressed. Follow up as necessary for any exhibits that have not be addressed.